

**FINAL AWARD DENYING COMPENSATION**  
(Reversing Award and Decision of Administrative Law Judge)

Injury No.: 06-057024

Employee: Kenneth Williams  
Employer: Missouri Department of Social Services  
Insurer: Central Accident Reporting Office (CARO)

This cause has been submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.<sup>1</sup> We have reviewed the evidence and briefs, heard oral argument, and we have considered the whole record. Pursuant to § 286.090 RSMo, the Commission reverses the award and decision of the administrative law judge (ALJ) dated June 24, 2010.

**Preliminaries**

The ALJ found that employee sustained an injury by accident arising out of and in the course of his employment on April 21, 2006, and that employer had actual notice of the injury within 30 days of its occurrence. As a result, the ALJ found employer liable for employee's past medical expenses, past temporary total disability benefits, and permanent partial disability benefits.

Employer appealed to the Commission. The primary issues currently before the Commission concern: 1) employer's notice of employee's injury; 2) whether the injury arose out of and in the course of employee's employment; and 3) medical causation.

**Findings of Fact**

Employee worked for employer, a juvenile detention facility in St. Louis, Missouri, during all times relevant to this case. On or about April 21, 2006, employer had scheduled a field trip to a rope course for employee's students. Employee was directed to accompany the students and about 6 adults on the field trip to observe, direct, and help the students. Employee was supposed to have visual contact with the students at all times in the threat that any of them might run away.

While observing the students, employee sat in the grass. In addition to sitting in the grass, employee did some sit-ups and push-ups while continuing to observe the students by maintaining visual contact with them.

At some point after the field trip date, employee noticed red marks on his hands and face, as well as puffy eyes. On May 4, 2006, employee was examined by Dr. Venkatesan, a partner of his primary care physician, Dr. Avery. Dr. Venkatesan noted a rash on employee's foot had been present for two weeks which employee attributed to using the YMCA hot tub. Dr. Venkatesan also noted erythematous, lichenified, hyperpigmentation, and urticaria on employee's face, hands, and legs and diagnosed contact dermatitis.

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<sup>1</sup> Statutory references are to the Revised Statutes of Missouri 2005 unless otherwise indicated.

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Employee had multiple complications with this skin condition and was ultimately diagnosed with methicillin-resistant staphylococcus aureus (MRSA).

Employee could return to work on July 18, 2006. On September 19, 2006, employee underwent his final abscess drainage of the left leg.

Employee completed an Employee Injury Report (for a Workers' Compensation claim) on June 9, 2006. One of employee's supervisors, Vernon Germain, testified that employer was not made aware of employee's workers' compensation claim until they received his injury report. Although Mr. Germain acknowledged that the injury report stated that employee had left phone messages on April 27, 2006, for him and Cornelius Robinson (employee's other supervisor) regarding the injury, Mr. Germain denied ever being informed that employee's absences were related to a work injury until after they received the June 9, 2006, injury report. Mr. Germain testified that he was absent from work on April 27, 2006. Mr. Robinson no longer works for employer and did not provide any testimony regarding this case.

Mr. Germain did not believe employee reported a work injury to Mr. Robinson because Mr. Robinson generally informed Mr. Germain of such reports. Mr. Robinson never spoke with Mr. Germain about employee's alleged work injury.

Mr. Germain testified that they were aware employee was missing work during May 2006, but they were never informed that his absences were related to a work injury. Mr. Germain stated that they received a statement from employee's doctor in May 2006 informing employer that employee had an abscess in his groin that had to be removed, but the origin of the abscess was never revealed to employer.

Mr. Germain testified that employee ran out of sick leave halfway through June and started using his vacation time thereafter.

Mr. Germain testified that in addition to the injury report, he also received a copy of a letter employee wrote to employer's Division Director in Jefferson City, Missouri seeking assistance for the work injury. The letter was undated, but Mr. Germain testified that he received the letter no earlier than June 2006.

Employee testified that the field trip was on April 20, 2006. Employee stated that the next day, April 21, 2006, he began noticing symptoms. Employee testified that all of his students kept asking him what was wrong with his skin and a teacher told him that he needed to see a doctor. Employee stated that he called and left a message for Mr. Germain and then called Mr. Robinson. Employee testified that he received permission to leave early on that day and went directly to his doctor's office.

Other evidence suggests that employee's recollection of the field trip and subsequent events is not accurate. The medical records reveal that employee did not obtain treatment for his alleged injury until May 4, 2006, from Dr. Venkatesan. Employee's time sheet reveals that he worked a full shift for every scheduled work day throughout the month of April 2006. Employee testified on numerous occasions that his memory is

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impaired due to a stroke he suffered in 2004 and that he especially has difficulty recalling dates. At one point, employee affirmatively testified that the injury did not occur in the year 2006.

Based on the aforementioned, we do not find claimant's testimony regarding the date of the field trip and the sequence of events thereafter to be credible.

### **Conclusions of Law**

With regard to the issue of notice, § 287.420 RSMo provides, as follows:

No proceedings for compensation for any accident under this chapter shall be maintained unless written notice of the time, place and nature of the injury, and the name and address of the person injured, has been given to the employer no later than thirty days after the accident, unless the employer was not prejudiced by failure to receive the notice....

Based on the aforementioned findings of fact, we find that the most credible evidence establishes that the alleged work-related injury occurred on April 21, 2006, and employee did not provide notice, of any form, to employer until sometime in June 2006. Even if we assume that employer received a copy of employee's letter to the Division Director on June 1, 2006, this is still significantly later than 30 days after the alleged accident. Therefore, it is employee's burden to prove that employer was not prejudiced by its failure to receive timely written notice. *Seyler v. Spirtas Industrial*, 974 S.W.2d 536, 538 (Mo. App. 1998), overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

In discussing what constitutes "prejudice" by an employer's failure to receive notice within 30 days of the accident, the Court in *Seyler* stated as follows:

The purpose underlying the notice requirement is twofold. First, the notice requirement is designed to ensure that the employer will be able to conduct an accurate and thorough investigation of the facts surrounding the injury. The second purpose of the notice requirement is to ensure that the employer has the opportunity to minimize the employee's injury by providing prompt medical treatment. Thus, in cases where the employer does not have actual notice of the accident, courts have examined whether the claimant has proffered evidence on both the employer's ability to investigate the accident and the minimization of the employee's injury in determining whether the employer was prejudiced by the claimant's failure to provide written notice.

*Id.* at 538 (citations omitted).

In the instant case, assuming that employee's skin condition was contracted during the field trip on April 21, 2006, the record reveals that employee's medical treatment was delayed until May 4, 2006 (14 days later). During these 14 days after the field trip, employee's skin condition progressively worsened from red marks appearing on his

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hands and face (the day after the field trip, as stated by employee) to spreading to his armpits, legs and feet (by May 4, 2006) to affecting his eyelids, chest and abdomen, and his scrotum (by May 23, 2006). Additionally, employee underwent several leg surgeries and was treated for a staph infection. Employee accrued substantial medical expenses that were not authorized by employer. With proper notice, employer could have investigated the claim and – if deemed appropriate – referred employee to the appropriate specialist(s) prior to June 2006, when employer was first notified of employee's claim.

We find that employee did not provide notice to employer within 30 days of the occurrence of the alleged accident and that employee failed to prove that employer was not prejudiced by its late notice. Because the issue of notice is dispositive, we find that all other issues are moot. We hereby reverse the award and decision of the administrative law judge and find that employee's claim for benefits is denied.

The award and decision of Administrative Law Judge Linda J. Wenman, issued June 24, 2010, is attached solely for reference.

Given at Jefferson City, State of Missouri, this 7<sup>th</sup> day of March 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer

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Alice A. Bartlett, Member

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DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

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Secretary

Employee: Kenneth Williams

**DISSENTING OPINION**

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be affirmed. Therefore, I adopt the decision of the administrative law judge as my decision in this matter.

Because the Commission majority has decided otherwise, I respectfully dissent.

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John J. Hickey, Member

## AWARD

Employee:	Kenneth Williams	Injury No.:	06-057024
Dependents:	N/A		Before the
Employer:	Missouri Dept. of Social Services		<b>Division of Workers'</b>
Additional Party:	N/A		<b>Compensation</b>
Insurer:	Self-insured		Department of Labor and Industrial
Hearing Date:	March 11, 2010		Relations of Missouri
			Jefferson City, Missouri
		Checked by:	LJW

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: April 21, 2006 (corrected date)
5. State location where accident occurred or occupational disease was contracted: St. Louis County, MO
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:  
While providing required supervision of juveniles attending a field trip, Employee sat in grass and developed contact dermatitis.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Multiple body parts.
14. Nature and extent of any permanent disability: 20% BAW Permanent Partial Disability
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? \$2,936.52 reported (see award)

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- 17. Value necessary medical aid not furnished by employer/insurer? \$32,980.63
- 18. Employee's average weekly wages: Sufficient to produce the following rates:
- 19. Weekly compensation rate: \$417.69 / \$365.08
- 20. Method wages computation: Stipulated

**COMPENSATION PAYABLE**

21. Amount of compensation payable:

Unpaid medical expenses:	\$32,980.63
10 4/7 <sup>th</sup> weeks of temporary total disability (or temporary partial disability)	\$4,415.58
80 weeks of permanent partial disability from Employer	\$29,206.40

22. Second Injury Fund liability: N/A

TOTAL:	\$66,602.61
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23. Future requirements awarded: N/A

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments in favor of the following attorney for necessary legal services rendered to the claimant: Joseph D. Klenofsky

**FINDINGS OF FACT and RULINGS OF LAW:**

Employee:	Kenneth Williams	Injury No.: 06-057024
Dependents:	N/A	Before the
Employer:	Missouri Dept. of Social Services	<b>Division of Workers'</b>
Additional Party:	N/A	<b>Compensation</b>
		Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
Insurer:	Self-insured	Checked by: LJW

**PRELIMINARIES**

A hearing for final award was held regarding the above referenced Workers' Compensation claim by the undersigned Administrative Law Judge on March 10, 2010. The parties were provided an opportunity to file a post-trial brief, and with receipt of Claimant's brief, the last brief was received on March 30, 2010. Attorney Joseph Klenofsky represented Kenneth Williams (Claimant). Missouri Department of Social Services (Employer) is self-insured, and represented by Assistant Attorney General Lavander Smith.

Prior to the start of the hearing, the parties identified the following issues for disposition in this case: accident; arising out of and in the course and scope of employment; medical causation; notice; liability for past medical expenses; liability of Employer for past temporary total disability (TTD) benefits; and liability of Employer for permanent partial disability (PPD) benefits.

Claimant offered Exhibits A-G, and I. Exhibits A-B, F-G and I were admitted without objection. Employer objected to Exhibits C-E citing lack of certifications. By consent, the hearing record was to remain open until March 31, 2010, to allow Claimant to provide the appropriate certifications. The certifications for Exhibits C-E were received and the evidentiary record closed on March 30, 2010, and Exhibits C-E are admitted.<sup>1</sup> Employer offered Exhibits 1-2, which were received without objection.

Prior to the close of the evidentiary record, Counsel for Employer notified the Court a document contained within Exhibit E did not match the document contained in his record. It appeared to Employer's Counsel the page titled "Delmar Gardens Home Care Admission Consent" had only been copied on one side. Upon proper notification, both parties appeared, were heard, and a ruling issued substituting the two-sided copy for the single-sided copy.<sup>2</sup>

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<sup>1</sup> In addition to the certifications received for Exhibits C-E, on March 30, 2010, Claimant also provided four additional certifications. Three of the additional certifications represent certifications of documents previously admitted, and the fourth certification provided by Mercy Health Plans represents 13 pages of unknown records.

<sup>2</sup> The single-sided copy of the Delmar Gardens Home Care Admission Consent document is preserved in the record for review if needed.

Counsel for Claimant was granted leave to file an amended post-trial brief addressing the substitution.

Any markings contained within any exhibit were present when received, and the markings did not influence the evidentiary weight given the exhibit. Any objections not expressly ruled on in this award are overruled.

### **FINDINGS OF FACT**

All evidence presented has been reviewed. Only testimony and evidence necessary to support this award will be reviewed and summarized.

1. Claimant is fifty-three years old, weighs approximately 350 pounds, and has a history of suffering a stroke during 2004, which left him with residual left leg weakness and difficulty recalling dates. Claimant worked for Employer as a basic skills teacher teaching court ordered juvenile detention students from June 2001 until November 2006. When necessary, Employer would utilize its teachers to staff student field trips. While staffing a field trip, a teacher was required to maintain eye contact over students to ensure the students did not escape detention.
2. In an attempt to improve his health following his stroke, Claimant undertook a weight loss and exercise program. Claimant joined his local YMCA, began a weight lifting program, walked in the pool, and walked around the YMCA's track. Due to his exercise routine, Claimant had recently lost 50 pounds. Two weeks before an April 21, 2006 field trip, Claimant developed a rash on the top of his right foot. The rash was later diagnosed as tinea pedis (athletes foot).
3. On April 21, 2006, Employer had scheduled a field trip for Claimant's students to a rope course. As a result of understaffing Claimant was required to attend the field trip. The field trip began at 8:30 a.m., and ended at 3:00 p.m. Claimant wore a short sleeved shirt, shorts, and socks and shoes. While at the rope course, staff attending the field trip were not provided seating, and Claimant periodically sat in the grass. While sitting in the grass and maintaining student eye contact, on several occasions Claimant performed exercises that involved push-ups and sit-ups.
4. Claimant awoke the next morning with puffy eyes, and an itchy red rash on his face. As the day progressed, Claimant's itching intensified and spread to other areas of his body. By late evening, his itching became overwhelming as the rash spread. Over the next two weeks Claimant tried various over-the-counter medications to treat the itching and rash.
5. On May 4, 2006, Claimant was examined by Dr. Venkatesan, a partner of his primary care physician.<sup>3</sup> Dr. Venkatesan noted Claimant presented with a rash that involved his upper and lower extremities that Dr. Venkatesan described as erythematous and lichenified hyperpigmentation, and on his face described as urticaria. Dr. Venkatesan diagnosed contact dermatitis, and tinea pedis. For the contact dermatitis, Dr. Venkatesan prescribed a Medrol dose pack and Alarax for the itching. For the tinea pedis, Dr. Venkatesan prescribed Lamisil. Dr.

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<sup>3</sup> Claimant testified his appointment with Dr. Venkatesan occurred the day after the field trip, although Claimant acknowledged he had difficulty with dates, and could not recall exact dates he worked for Employer following the field trip.

Venkatesan noted Claimant's foot rash had been present for two weeks, and Claimant attributed using the YMCA hot tub as the source of the foot rash.<sup>4</sup>

6. On May 11, 2006, Claimant was examined by his primary care physician, Dr. Avery, after his symptoms had returned, and after Claimant had completed the medications prescribed by Dr. Venkatesan. Dr. Avery diagnosed severe contact dermatitis, and noted Claimant reported his symptoms began after he sat in the grass on the day of the field trip. Dr. Avery placed Claimant on a higher dose and longer length of steroids, and recommended Claimant take oatmeal baths to help control the itching.

7. Claimant returned to Dr. Avery on May 23, 2006. Upon examination, Dr. Avery noted Claimant's rash looked better, but Claimant had developed a very deep abscess on his left calf. Dr. Avery determined Claimant required emergency surgery for debridement, and Claimant was admitted to Barnes Hospital. Claimant underwent surgery on the evening of admission, and the abscess was cultured and reported positive for methicillin resistant staphylococcus aureus (MRSA).

8. On May 24, 2006, while hospitalized, a dermatology consultation was requested. Dermatology diagnosed an allergic contact dermatitis with secondary infection from recent grass exposure and questionable chemical pesticide exposure. On May 26, 2006, Claimant developed scrotal swelling and drainage and was taken to surgery for drainage of a scrotal abscess. On May 27, 2006, Claimant developed an abscess on his right buttock that required surgical drainage. Claimant was discharged on May 29, 2006, with home health care to assist with dressing changes. Post-discharge wound care was assumed by the Barnes Wound Center and Dr. Avery.

9. On July 7, 2006, Claimant's Wound Center physician indicated Claimant could return to work as of July 18, 2006. On September 19, 2006, Claimant again underwent out-patient surgery to drain two abscesses on his left calf. On October 6, 2006, the Wound Center noted slow healing ulcerations of Claimant's left lower leg.

10. As of hearing, Claimant walks with a four-prong cane due to weakness in his left leg. Claimant testified he experiences constant leg and scrotum pain, left leg stiffness and problems with standing. Claimant testified he was off work from April 21, 2006 until September 30, 2006.<sup>5</sup> Claimant completed an Employee Injury Report-Workers' Compensation form on June 9, 2006, and indicated he notified "Mr. Robinson/Mr. Germaine" of his injury by phone call placed at 9:45 on April 27, 2006.

11. Mr. Gregory Blunt was employed as a Recreation Officer II for Employer from 1997 until 2009. Mr. Blunt attended the field trip on the alleged date of injury. Mr. Blunt confirmed Claimant wore shoes, shorts and a shirt while on the field trip, Claimant was outside during the entire trip, and Claimant periodically sat in the grass during the day. Mr. Blunt testified he knew the area covered during the field trip had a history of spiders and poison ivy. On the day of the

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<sup>4</sup> During testimony Claimant denied he ever used the YMCA hot tub, or placing any body part into the hot tub. Claimant testified he and Dr. Venkatesan had a language barrier on the day of his office visit. Claimant also testified his YMCA membership had lapsed since February 2006.

<sup>5</sup> Employer's attendance records demonstrate Claimant's first sick day occurred on May 5, 2006, but Employer's records end on June 30, 2006.

field trip Mr. Blunt did not notice a skin rash on Claimant, but did observe a rash on Claimant's neck and leg the next day.

12. Mr. Vernon Germain testified on behalf of Employer. Mr. Germain is an Assistant Regional Administrator for Employer, one of Claimant's supervisors. Mr. Germain verified Claimant attended the April 21, 2006 Ropes Course field trip. Mr. Germain testified he saw Claimant from an approximately 5-6 feet distance on April 24-26<sup>th</sup> and he did not notice Claimant's alleged skin rash. Mr. Germain denied receiving a phone call from Claimant reporting an illness, but acknowledged Claimant spoke to a secretary who passed the message to him from May 3, 2006 through June 2006. Mr. Germain testified he first became aware Claimant was alleging a work related injury on June 9, 2006. Upon cross-examination, Mr. Germain acknowledged the Report of Injury Claimant filed on June 9, 2006, indicated Claimant had left phone messages regarding the injury for Mr. Germain and Mr. Robinson, his managing supervisor on April 27, 2006 at 9:45. Mr. Robinson no longer works for Employer. Mr. Germain also acknowledged receiving during June 2006, a copy of letter written by Claimant to Employer's Division Director in Jefferson City seeking assistance due to the work related injury.

13. Dr. Avery examined Claimant and provided a rating report on September 27, 2007, and later provided testimony by deposition. Upon examination, Dr. Avery noted Claimant's leg wound had healed, but Claimant continued to experience pain and weakness in his left leg, and he used a four prong cane for assistance. Dr. Avery found decreased left hip and knee range of motion, with measurable left hip and knee flexion weakness, and mild flexion/extension weakness of his left foot. Dr. Avery observed Claimant's gait, noted a limp with slowness in moving, and difficulty going from a sitting position to a standing position and vice versa. Dr. Avery opined Claimant had a permanent disability due to the April 2006 work injury which arose from his contact dermatitis. During deposition testimony, Dr. Avery rated Claimant's disability at 30-50% referable to Claimant's leg. Dr. Avery opined it was reasonable for Claimant to have been off work while recovering, and the medical care Claimant received was reasonable and necessary to relieve his injury.

14. Dr. Tominack, a medical toxicologist, testified on behalf of Employer. Dr. Tominack was asked by Employer to evaluate the chemical Zep 777-EC, and any relationship between the chemical and Claimant's contact dermatitis. Upon analysis, Dr. Tominack concluded Zep 777-EC, or any similar herbicide, could not have produced Claimant's dermatitis. Upon cross-examination, Dr. Tominack, conceded Zep 777-EC was provided to her by Employer's case manager, and doesn't know why the case manager believes Zep 777-EC was the herbicide Claimant may have come in contact with, or if it was used in the rope course grassy areas. In her August 31, 2008 report, Dr. Tominack accepted Dr. Avery's diagnosis of contact dermatitis, Type IV delayed, cell-mediated immunologic reaction similar in pathology to poison ivy dermatitis.

### **RULINGS OF LAW WITH SUPPLEMENTAL FINDINGS**

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find the following:

**Issues relating to accident & arising out of and course and scope of employment and medical causation**

Claimant bears the burden of establishing the essential elements of his claim. Included in the essential elements, is establishing accident, arising out of employment, and being in the course and scope of his employment when the injury occurred. The Missouri Workers' Compensation law was amended during the 2005 legislative session. Section 287.020.2 RSMo., 2005,<sup>6</sup> now provides: The word "accident" as used in this chapter shall mean an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor.

Section 287.020.3(1), provides: In this chapter the term "injury" is hereby defined to be an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. "The prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

Section 287.020.3(2), provides in part: an injury shall be deemed to arise out of and in the course of employment only if:

(a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and

(b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.

Included in the 2005 amendments to Chapter 287, was the express intent of the legislature rejecting and abrogating established case law that had defined "accident," "arising out of," and "in the course of employment."

Following the 2005 amendments, two reportable cases have emerged from the Missouri Appellate Courts discussing the provisions cited above. Both are distinguishable on the facts from the instant case. In *Bivens v. St. John's Regional Health Center*, 272 S.W.3d 446 (Mo.App. 2008), the employee was walking down a hallway to clock in when she "just fell." *Id.* In sustaining the Labor and Industrial Relations Commission (LIRC), the *Bivens* Court noted the LIRC had determined the employee had presented no rational connection between her work and the injury that was sustained, and the employee had failed to show that she was exposed to an unusual risk of injury not shared by the general public. *Id.* In *Miller v. Missouri Highway and Transportation Commission*, No. SC 89960, (Mo.banc 2009), while repairing a highway, a highway worker was walking briskly toward his truck when he felt a pop in his knee. The Missouri Supreme Court found:

The injury here did not occur because Mr. Miller fell due to *some condition of his employment*. He does not allege that his injuries were worsened due to *some condition of*

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<sup>6</sup> Unless otherwise indicated all further references are to RSMo Supp.2005.

*his employment* or due to being in an unsafe location *due to his employment*. He was walking on an even road surface when his knee happened to pop. *Nothing about work caused it to do so*. The injury arose during the course of employment, but did not arise out of employment. (emphasis supplied) *Id.*

In the instant case, Claimant presents a rational connection between his work and the injury sustained. Claimant's job duties *required* him to attend student field trips when staffing was short. While Employer did not require Claimant to sit in the grass while on a field trip, Employer did not provide alternative seating for staff, and acquiesced to staff sitting in the grass as long as staff maintained eye contact with students. While fulfilling the *required* elements of his job duties, Claimant developed a rash, which all medical experts agree resulted in a diagnosis of contact dermatitis similar to poison ivy. Claimant also met his burden to establish he was exposed to a risk of injury not shared by the general public. The general public may be exposed to the development of a rash if they sit in the grass, but the general public is not required to attend day-long field trips with no available alternative seating. While Claimant may have engaged in personal exercise on occasion throughout the day of the field trip, while conducting his exercise Claimant also continued to perform his job duties and maintained eye contact at the same time. Claimant's testimony regarding the exercise was received uncontroverted, and there is no evidence that pinpoints the places of exercise to be where the contact occurred. I find Claimant met his burden to establish on April 21, 2006, he sustained an accident that arose out of and in the course and scope of his employment with Employer.

To be medically causally related the work must be the prevailing factor in the cause of the resulting medical condition and disability. §287.020.2 RSMo. Medical causation not within lay understanding or experience requires expert medical evidence. *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596 (Mo.banc 1994) (overruled on other grounds). The weight to be accorded an expert's testimony should be determined by the testimony as a whole and less than direct statements of reasonable medical certainty will be sufficient. *Choate v. Lily Tulip, Inc.*, 809 S.W.2d 102 (Mo.App. 1991) (overruled on other grounds). Two physicians provided opinions on the relationship between the exposure and Claimant's need for medical treatment. Dr. Avery opined Claimant's development of contact dermatitis and resultant MRSA were predominantly caused by his employment. Dr. Tominack spent a large portion of her report demonstrating the chemical Zep 777-EC could not have caused Claimant's rash. Other than speculation by Claimant that a "chemical" caused his rash, there is no evidence Claimant is asserting Zep 777-EC is the source of his rash. Dr. Tominack does accept Dr. Avery's diagnosis as contact dermatitis, type IV delayed, similar in pathology to poison ivy, but concluded the type of lesions seen on Claimant "suggest that they were chronic in nature, with an acute flare-up, and that the patient had been rubbing or scratching these same periodically inflamed areas for an extended period of time." Dr. Tominack never examined Claimant, and the overwhelming weight of evidence demonstrated Claimant's contact dermatitis was due to an acute onset, not a chronic condition. The only rash Claimant had present on his body on the date of the field trip was tinea pedis or athlete's foot. On the date of the field trip Claimant wore shoes. The initial examining physician, Dr. Venkatesan, made *two* distinct diagnoses on the date of examination, contact dermatitis and tinea pedis, recognizing the contact dermatitis to be acute, and the tinea pedis on Claimant's right foot to have been present prior to Claimant's contact with grass. I find the opinion of the treating physician, Dr. Avery to be credible and consistent with the evidence in this case. I find Claimant has met his burden to establish medical causation.

### **Issues related to notice**

Employer asserts a notice defense. Section 287.420 RSMo states: no proceeding for compensation for any accident under this chapter shall be maintained unless written notice of time, place and nature of injury, and the name and address of the person injured, has been given to the employer no later than thirty days after the accident, unless the employer was not prejudiced by failure to receive the notice. . . . Claimant has the burden of proving Employer was not prejudiced by its failure to receive timely written notice, if written notice is not received within 30 days. Verbal notice given to a supervisory employee of a potentially compensable injury is imputed to the employer. *Dunn v. Hussman Corp.*, 892 S.W.2d 676, 681 (Mo.App. 1994). A prima facie showing of lack of prejudice is made by establishing that actual notice was given to a supervisor within 30 days of the injury. *Ford v. Bi-State Development Agency*, 677 S.W.2d 899 (Mo.App. 1984).

Employer asserts written notice of the injury was received when Claimant submitted his Employee Injury Report – Workers Compensation form (CARO form) on June 9, 2006, approximately 50 days after the alleged injury. Contained within that form are earlier specific dates and times he left messages for two supervisors who Claimant alleges did not return his calls. Claimant testified he resorted to writing a letter to his Department Director in Jefferson City after CARO informed him his supervisor must complete paperwork before the incident could be considered for workers' compensation benefits. Two supervisors were named on the CARO form. Mr. Germain testified he did not receive a call, but the second supervisor named, Mr. Robinson, would have been the appropriate supervisor for Claimant to call. Mr. Robinson is no longer employed by Employer and did not testify. Whether an employer has actual notice of a compensable injury is a question of fact to be resolved by the trier of fact. *Gander v. Shelby County*, 933 S.W.2d 892, 895 (Mo.App. 1996). Based on the testimony and documentary evidence presented, I find Claimant has prevailed in making a prima facie showing of lack of prejudice by establishing Employer had actual notice of the injury within 30 days of its occurrence. I further find Employer failed to overcome the prima facie case by failing to adduce evidence of prejudice.

### **Issues related to past medical expenses**

Section 287.140.1 RSMo., provides that an employer shall provide such medical, surgical, chiropractic, ambulance and hospital treatment as may be necessary to cure and relieve the effects of the work injury. Additionally, §287.140.3 RSMo., provides that all medical fees and charges under this section shall be fair and reasonable. A sufficient factual basis exists to award payment of medical expenses when medical bills and supporting medical records are introduced into evidence supported by testimony that the expenses were incurred in connection with treatment of a compensable injury. *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105 (Mo.banc 1989).

Employer paid no medical benefits to date. Claimant sought reimbursement of medical expenses in the amount of \$33,020.95. Prior to the start of hearing, Claimant withdrew \$40.32 of the medical charges sought. Itemized listings of the remaining charges were issued by the medical providers, supported by the appropriate medical records and Claimant's testimony. Employer did not challenge the reasonableness or necessity of the treatment provided.

Claimant's injury is compensable, and he has met his burden of evidence. Accordingly, I find Employer liable for \$32,980.63 in medical expenses accrued by Claimant in an attempt to cure and relieve the effects of his work related injury.

**Issues related to past TTD benefits**

TTD benefits are intended to cover a period of time from injury until such time as claimant can return to work. *Phelps v. Jeff Wolk Construction Co.*, 803 S.W.2d 641 (Mo.App. 1991) (overruled on other grounds). Employer has paid no TTD benefits to date. Claimant seeks TTD benefits covering a period from April 21, 2006 through September 30, 2006. Claimant does not elaborate on how these dates were arrived upon. Dr. Avery testified it was reasonable for Claimant to be off work while he recovered. The Wound Center physician at Barnes noted Claimant was released to return to work on July 18, 2006. Employment records indicate Claimant started sick leave on May 4, 2006, the date he first sought medical treatment. Therefore, I find Employer liable for 10 4/7<sup>th</sup> weeks of past TTD benefits, a period covering May 5, 2006 through July 18, 2006, or \$4,415.58.

**Issues related to PPD benefits**

A permanent partial disability award is intended to cover claimant's permanent limitations due to a work related injury and any restrictions his limitations may impose on employment opportunities. *Phelps v. Jeff Wolk Construction Co.*, 803 S.W.2d 641,646 (Mo.App. 1991). The only medical expert who provided a rating is Dr. Avery. Dr. Avery rated Claimant's injury at 30-50% PPD referable to Claimant's leg. With respect to the degree of permanent partial disability, a determination of the specific amount of percentage of disability is within the special province of the finder of fact. *Banner Iron Works v. Mordis*, 663 S.W.2d 770, 773 (Mo.App. 1983) (overruled on other grounds). Based on the testimony and evidence presented, I find Claimant's disability to be 20% BAW PPD.

**CONCLUSION**

In summary, Claimant sustained an injury to his body that arose out of and in the course and scope of his employment with Employer. Claimant is awarded past medical expenses, past TTD benefits, and PPD benefits from Employer not inconsistent with this award.

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

LINDA J. WENMAN  
Administrative Law Judge  
Division of Workers' Compensation

A true copy: Attest:

\_\_\_\_\_  
Naomi Pearson  
Division of Workers' Compensation

